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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH A. IERVOLINO,

Petitioner,

v.

DELTA AIR LINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ALAN M. SERWER
(Counsel of Record)
RAYMOND C. FAY
BELL, BOYD & LLOYD
70 West Madison Street
Suite 3200
Chicago, Illinois 60602
(312) 372-1121

Counsel for Petitioner Joseph A. Iervolino

Of Counsel:
BELL, BOYD & LLOYD
1615 L Street, N.W.
Washington, D.C. 20036

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I.

THERE IS A SUBSTANTIAL CONFLICT AMONG THE COURTS AS TO WHETHER AN EMPLOYEE BEARS THE BURDEN OF PROOF ON AN EMPLOYER'S "REASONABLE FACTORS OTHER THAN AGE" DEFENSE.

In its opposition to the petition for certiorari, Delta claims that: 1) Iervolino failed to object to the jury instruction with respect to burden of proof on the "reasonable factors other than age" (RFOA) defense, 29 U.S.C. §623(f)(1), and 2) there is no conflict among the circuits as to the assignment of the burden of proof on this defense. Both contentions are clearly incorrect.

The Court of Appeals addressed the issue of the "burden of persuasion on the RFOA defense" directly (All), thereby acknowledging that Iervolino had objected to the assignment of the burden of proof in accordance with Fed.R.Civ.P. 51. Since the court below declined to reach certain other issues based on a determination that timely objections had not been raised in the trial court, it is obvious that the court concluded that the following objection raised by counsel before the jury retired was sufficient to preserve the issue:

> Mr. Serwer: I think in the hypothetical situation which the court describes, which is not present here, I think that perhaps could be the view of the Fifth Circuit, at least in that case. I personally disagree with that. I think that this is an affirmative defense, the same as a BFOQ. It's in the same section, and there is a long history of Fair Labor Standards Act cases that would suggest that affirmative defenses are those for which the defendant has the burden of proving, and not the contrary.

Tr. 2439.

Second, contrary to Delta's contention, the circuits are substantially split on the issue of whether the burden of proof rests on plaintiff to disprove the employer's RFOA defense. Despite Delta's claim to the contrary, courts in the Third, Sixth, Eighth and Ninth Circuits have found—in conflict with the decision below—either that the burden of proof is on the employer, or that the RFOA is an affirmative defense. In *EEOC v. Westinghouse Electric Corporation*, 725 F.2d 211, 222-223 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984), the court stated not only that defendant "bears the burden of going forward with evidence" on the RFOA defense, but also that the employer had "failed to establish a Section 4(f)(1) defense." If, as Delta contends (Opp. at 7), the Third Circuit placed the

burden of proof on plaintiff, that court would not have concluded that defendant had failed to meet its burden of proof.

The Sixth Circuit's decision in *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 920-21 (1984), did not hold, as Delta contends (Opp. at 7 n.16), "that the burden of proof on the RFOA defense falls to the plaintiff/employee." The RFOA defense does not appear to have been raised at all in *Davis*, and the passing reference to "factors other than age" (*Id.* at 920 n.2) does not indicate the court's view as to the appropriate allocation of the burden of proof for the RFOA defense in 29 U.S.C. §623(f)(1).[1] The Sixth Circuit addressed the RFOA defense more directly in *Laugesen v. Anaconda Co.*, 510 F.2d 307, 314-15 (6th Cir. 1975), in which the court cited, with apparent approval, the U.S. Department of Labor regulation stating that "all exceptions such as this [RFOA] must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer . . . which seeks to invoke it." 29 C.F.R. §860.103(e).

In order to contend that there is no conflict among the circuits, Delta ignores the decisions in *Marshall v. Roberts Dairy Co.*, 572 F.2d 1271 (8th Cir. 1978) and *Cova v. The Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958, 959-60 (8th Cir. 1978). In *Marshall*, the court stated that the

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[1] Delta also contends that the courts in *Crimm v. Missouri Pac. R. Co.*, 750 F.2d 703, 713 (8th Cir. 1984), and *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 462-64 (7th Cir. 1986), placed the burden on plaintiff to disprove the RFOA defense. This is incorrect. Each case describes the general contours of the ADEA, but in neither case is there an indication that defendant asserted an RFOA defense under 29 U.S.C. §623(f)(1).

"burden shifted to Dairy to prove that the employees were discharged for reasons other than age." 572 F.2d at 1277. In *Cova*, the court held that "an employer may meet this burden by showing that the discharge was 'based on reasonable factors other than age,' 29 U.S.C. §623(f)(1)." Both cases, therefore, are squarely in conflict with the decision of the court below.

Finally, and also contrary to Delta's contention, the Ninth Circuit's opinion in *Criswell v. Western Air Lines, Inc.*, 709 F.2d 544 (1983), *aff'd*, 472 U.S. 400 (1985), was not "contrary to prior Ninth Circuit precedent." (Opp. at 7) The case cited by Delta for that contention, *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407 (9th Cir. 1981), states the contrary. There the court noted the rule that plaintiff generally bears the "burden of persuasion," but also noted that the RFOA defense was an "affirmative defense." *Id.* at 408-09 n.2.

II.

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF OTHER COURTS AS TO WHETHER AN EMPLOYER MAY PROVE THAT "AGE IS A BONA FIDE OCCUPATIONAL QUALIFICATION" BASED ON FACTORS OTHER THAN AGE.

Delta supports the confused reasoning of the court below that even if the jury was incorrectly instructed that a BFOQ could be proven with non-age based ("role reversal") evidence, no harm to Iervolino occurred because the same evidence was "properly before the jury in connection with Delta's RFOA defense." (Opp. at 8) This logic is built on a shaky foundation, since it is totally dependent on whether the burden of proof on the RFOA defense was correctly assigned. Not only that, but Delta's argument is also flawed because it fails to address: 1) the hopeless confusion to which the jury was subjected in hav-

ing to sort out the difference between two defenses with opposite burdens based purportedly on the same evidence, and 2) the strong possibility that the jury, in rendering a general verdict, decided the case for Delta based on its BFOQ defense after delivery of an erroneous instruction by the court.

Even if the jury instruction on the RFOA defense was correct in every respect, the harm to Iervolino was no less severe if the jury found for Delta on the BFOQ defense as a result of an instruction directing the jury that the defense could be proved based on factors other than age. *See* A43-44. "Juries act in accordance with instructions given them . . ." *City of Los Angeles v. Heller*, 106 S.Ct. 1571, 1573 (1986). Where, as here, the BFOQ jury instruction was defective because of a misstatement of law, that instruction "is not cured simply by a correct statement appearing elsewhere." *Jamesbury Corp. v. Litton Industrial Products, Inc.*, 756 F.2d 1556, 1560 (Fed. Cir. 1985).

Here, the instructions to the jury on both the RFOA and BFOQ defenses were inadequate, misleading, and hopelessly confused. Since these were the critical issues in the case, it appears certain that the jury was misled. *Ware v. Reed*, 709 F.2d 345, 348-49 (5th Cir. 1983); *National Railroad Passenger Corp. v. One 25,900 Square Foot Parcel of Land*, 766 F.2d 685, 688 (2d Cir. 1985).

III.

THE JURY INSTRUCTIONS AND EVIDENTIARY RULINGS ON THE BFOQ DEFENSE WERE IN CONFLICT WITH THE STANDARD ANNOUNCED IN *WESTERN AIR LINES, INC. v. CRISWELL.*

In *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 105 S.Ct. 2743 (1985), this Court held that the BFOQ de-

fense must be established under a "reasonable necessity" standard of proof, rather than mere "reasonableness." The charge below differed materially from this statutory standard by repeatedly directing the jury to evaluate Delta's BFOQ defense based on whether it believed the policy was reasonable. ("Delta's policy must be . . . reasonable in light of considerations of safety"). (A42)[2]

Compounding the harm was the trial court's refusal to permit Iervolino to identify by name the ten major airlines which did not impose an age 60 limitation for flight engineers. In *Western*, this Court concluded that such evidence is highly probative on the BFOQ issue because it shows "reputable businesses in the same industry that choose to eschew reliance on mandatory retirement earlier than age 70." *Western*, 105 S.Ct. at 2756.

The trial court's order barring Iervolino from identifying the specific airlines employing age 60 flight engineers not only prevented him from making reference to specific airlines in his case in chief, but also precluded his cross-examination of Delta's witnesses as to how the company's safety standards and accident experience compared with

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[2] Delta's claim that Iervolino failed to object to the "reasonableness" standard which permeated the trial court's BFOQ instruction is incorrect. Counsel for Iervolino stated at trial (Tr. 2681):

> Mr. Serwer: But many courts have distinguished between reasonable and reasonably necessary. And cases have been reversed because trial courts had used the word "reasonable," rather than reasonably necessary in the charge.
>
> The one that comes to mind immediately is the *Harris* case in the Ninth Circuit in which the court distinguished between use of the word "reasonable." It said reasonable, in that case, means something less than reasonably necessary, and the law would require that the occupational qualification involved be reasonably necessary to the normal operation of the business.

specific major airlines having no age sixty limitation policy. Iervolino's limited ability to refer only to a list of 485 flight engineers on unnamed airlines, without disclosing the names or numbers of such airlines, was inadequate to avoid serious prejudice in the presentation of his case.[3]

IV.

THE DISPARATE IMPACT ISSUE WAS PRESERVED, AND THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THIS ISSUE.

Delta's claim that Iervolino failed to preserve the disparate impact issue at trial is incorrect. The pretrial order required Iervolino to state the "legal issues to be tried" and nothing more. In response, Iervolino described the legal issues in terms of whether Delta had violated the prohibitions in the ADEA, 29 U.S.C. §§623(a)(1) and (a)(2). Neither "disparate impact" nor "disparate treatment" was explicitly stated in the pretrial order, but both methods of recovery are derived from the statutory provisions and decisions of the courts under the ADEA. Plaintiff's disparate impact theory was, in addition, discussed on several occasions at the pretrial conference, and Delta never claimed surprise or prejudice when Iervolino requested that the jury be charged on this alternative means of recovery.

Contrary to Delta's claim (Opp. at 14), counsel for Iervolino did not state "that the statute does not provide

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[3] Delta argues that the trial court permitted identification of certain airlines so long as their employment of flight engineers over age sixty was "without the threat of litigation." Pretrial Conference Transcript at 38 (May 4, 1984). This exception was without practical significance, since all airlines employing age sixty flight engineers have, at one time or another, confronted litigation on the issue.

notice of the disparate impact theory." Iervolino's counsel's statement at trial (Tr. 2709) that "There's no specific statutory language" on disparate impact was not a concession that the theory was not available under and derived from the ADEA, but rather that the words "disparate impact" are not explicitly stated in the statute itself.

As Judge Johnson noted in dissent, the "statute does not provide in words for a 'disparate impact' remedy" (A26), but that does not mean that Delta and the trial court were not advised that Iervolino was intending to seek such a remedy. Judge Johnson concluded (A27):

> It is clear from the transcription of the discussions at the pretrial conference that all actors below were aware that Iervolino planned to argue disparate impact. The majority overlooks the fact that at the pretrial conference, when the parties and the judge engaged in a lengthy colloquy to set forth the theories of recovery, remedy sought, and defenses offered, Iervolino's attorney clearly noted that he planned to pursue a disparate impact argument. That he planned to do so was so obvious to all parties that Iervolino's lawyer twice stated his desire not to be misunderstood as relying solely upon that theory: "I don't want the court to . . . misunderstand that ours is only a disparate impact claim, it's [also] a disparate treatment claim . . ." R. 11-147.

Delta's contention that the disparate impact issue was not tried by "implied consent" is similarly incorrect. Iervolino presented evidence, without objection, that the collective bargaining agreement permitted "bidding down" without limitation, and that 936 pilots under age sixty had done so in the past. (PX74) The evidence also showed that the only pilots to be denied the right to downbid were those at or approaching age sixty. Therefore, if a no-downbid policy existed apart from the collective bargain-

ing agreement, and if it was neutral on its face, its application had a disparate adverse impact on age sixty pilots. Despite ample evidence on this issue, the trial court refused to instruct the jury on Iervolino's disparate impact remedy. As Judge Johnson observed, "[g]iven the differences in the standard of proof for this theory, prejudice to Iervolino was inevitable." (A27)

CONCLUSION

For the reasons stated above and in the Petition, a Writ of Certiorari should be issued to review the opinion and judgment of the Eleventh Circuit.

Respectfully submitted,

ALAN M. SERWER
(Counsel of Record)
RAYMOND C. FAY
BELL, BOYD & LLOYD
70 West Madison Street
Suite 3200
Chicago, Illinois 60602
(312) 372-1121

Counsel for Petitioner
Joseph A. Iervolino

Of Counsel:

BELL, BOYD & LLOYD
1615 L Street, N.W.
Washington, D.C. 20036

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